

HONORABLE JAMES L. ROBERT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

v.

MOTOROLA, INC., et al.,

Defendants.

No. C10-1823-JLR

MICROSOFT'S 10/15/12 MOTION TO
FILE DOCUMENTS UNDER SEAL

**NOTED FOR:
Friday, October 26, 2012**

MOTOROLA MOBILITY, INC., et al.,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

I. RELIEF REQUESTED

Pursuant to Local Civil Rule 5(g) and paragraphs 2(a) and 8 of the protective order entered in this case, Microsoft respectfully seeks leave to file under seal the following documents:

- (1) Exhibits 2, 3, 6, 7, 9-11 to the Declaration of Christopher Wion in Support of Microsoft's Opposition to Defendants' Motions *in Limine* (the "10/15/12 Wion Declaration"); and
- (2) Microsoft's Opposition to Defendants' Motions *in Limine*.

MICROSOFT'S 10/15/12 MOTION TO FILE
DOCUMENTS UNDER SEAL - 1

No. C10-1823

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1 Microsoft seeks to file the foregoing materials under seal because they contain
 2 information that has been identified by Microsoft, Motorola, and/or third parties as confidential
 3 business information under the terms of the protective order issued in this case. In addition,
 4 with the exception of two exhibits (Exhibits 7 and 11), all of the referenced exhibits to the
 5 10/15/12 Wion Declaration already have been sealed pursuant to prior Court orders.

6 For these reasons, and as more fully described below, good cause exists for protecting
 7 the confidentiality of these documents. Microsoft respectfully requests permission to file the
 8 above-referenced documents under seal and that the Court direct such documents to remain
 9 under seal. Microsoft is filing a redacted version of its Opposition to Defendants' Motions *in*
 10 *Limine* as part of the public record.

11 II. FACTS & AUTHORITY

12 A. The Operative Protective Order and Applicable Court Rules Permit Microsoft to 13 File Confidential Information under Seal.

14 Pursuant to the Protective Order issued by the Court on July 21, 2011, as amended by
 15 Order dated October 3, 2012, Microsoft is permitted to file materials designated by either party
 16 as Confidential Business Information¹ under seal, with such documents to remain under seal
 17 upon Court approval. Paragraphs 2(a) and 8 of the Protective Order govern the filing of
 18 documents under seal. Paragraph 2(a) provides:

19 Any information submitted in pre-trial discovery or in a pleading, motion, or
 20 response to a motion in this action, either voluntarily or pursuant to order, and
 21 which is asserted by a supplier to contain or constitute Confidential Business
 22 Information shall be so designated by such supplier in writing...and shall be
 23 segregated from other information being submitted. Documents shall be clearly
 24 and prominently marked on their face with the legend: "[SUPPLIER'S NAME]
 25 CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO

1 "Confidential Business Information" is defined in the parties' Protective Order as "information which has not
 2 been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or
 3 apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories,
 4 amounts or source of any income, profits, losses, or expenditures." Protective Order Regarding the Disclosure
 5 and Use of Discovery Materials (ECF No. 72), ¶1 (amended by Order dated October 3, 2012 (ECF No. 447)).

PROTECTIVE ORDER” or a comparable notice. During the pre-trial phase of this action, such information, whether submitted in writing or in oral testimony, shall be disclosed only *in camera* before the Court and shall be filed only under seal, pursuant to Rule 5(g) of the Local Civil Rules of the United States District Court for the Western District of Washington.

Paragraph 8 likewise provides that:

Any Confidential Business Information submitted to the Court in connection with a motion or other proceeding within the purview of this action shall be submitted under seal pursuant to paragraph 2 above.

Id., at ¶ 8.

The Federal Rules of Civil Procedure recognize that courts may permit parties to file “trade secrets or other confidential research, development, or commercial information” under seal. Rule 26(c)(1)(G) and (H). District courts “are in the best position to weigh the fairly competing needs and interests of the parties affected by discovery,” in crafting the appropriate treatment of documents for which protected treatment is requested. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199 (1984); *see also Phillips v. General Motors Corp.*, 307 F.3d 1206, 1211-1212 (9th Cir. 2002).

Additionally, pursuant to Local Rule CR 5(g)(2), the Court may seal a document filed in support of a non-dispositive motion upon a showing of good cause. Where the material sought to be sealed “includes information about proprietary business operations, a company’s business model or agreements with clients, there are compelling reasons to seal the material because possible infringement of trade secrets outweighs the general public interest in understanding the judicial process.” *Selling Source, LLC v. Red River Ventures, LLC*, 2011 U.S. Dist. LEXIS 49664, 18 (D. Nev. Apr. 29, 2011).

Further, while the public generally enjoys a right to inspect and copy public records, “it is uncontested ... that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.” *Nixon v. Warner Communications*,

1 *Inc.*, 435 U.S. 589, 598, 98 S. Ct. 1306 (1978). As the Court recognized, one such “improper
 2 purpose” is where the commercial business information at issue is sought to be used as a
 3 “source[] of business information that might harm a litigant’s competitive standing.” *Id.*
 4 (denying access to copies of tapes played at trial and noting that courts refused public access to
 5 their files where granting such access might “become a vehicle for improper purposes,”
 6 including causing a litigant competitive harm). Good cause exists to grant Microsoft’s motion
 7 to seal.

8 **B. Good Cause Exists for Microsoft to File the Referenced Documents under Seal.**

9 1. Exhibits to 10/15/12 Wion Declaration.

10 a. Exhibits 2, 3, 6, 9 and 10 Previously Have Been Sealed Pursuant to this
 11 Court’s Orders.

12 Exhibit 2 previously was sealed pursuant to this Court’s Order dated 6/6/12 (ECF No.
 13 336). Exhibit 3 was sealed pursuant to an Order dated 9/10/12 (ECF No. 420). Exhibit 6 was
 14 sealed pursuant to an Order dated 9/13/12 (ECF No. 433). Exhibits 9 and 10 were sealed
 15 pursuant to an Order dated 9/10/12 (ECF No. 419).

16 In accordance with the Court’s prior Orders, Microsoft is filing each of the foregoing
 17 Exhibits under seal.

18 b. Exhibit 7 – David W. Curtis Deposition Transcript

19 Exhibit 7 is a copy of the transcript from the July 12, 2012 deposition of Motorola
 20 employee David Curtis. Mr. Curtis testified extensively regarding Motorola’s confidential
 21 licensing practices and Motorola has designated the transcript as “Highly Confidential –
 22 Attorneys’ Eyes Only” under the terms of the Protective Order.

23 c. Exhibit 11 – Expert Report of Michael Dansky

24 Exhibit 11 is a copy of the July 24, 2012 Opening Expert Report of Motorola’s expert,
 25 Michael J. Dansky, submitted in this matter. Motorola has designated Mr. Dansky’s opening

1 report as “Highly Confidential – Attorneys’ Eyes Only” under the terms of the Protective
 2 Order. Mr. Dansky’s report includes extensive references to confidential and non-public
 3 financial and business information relating to both Microsoft and Motorola, and should be
 4 maintained under seal. Disclosure of this information to third parties or others not covered by
 5 the protective order would have the potential to lead to competitive harm.

6 2. Microsoft’s Opposition to Defendants’ Motions *in Limine* Includes References to
 7 Confidential Information Contained in the Above-Referenced Exhibits, and Should
 8 Be Redacted

9 Microsoft’s Opposition to Defendants’ Motions *in Limine* includes references to and
 10 descriptions of the confidential information contained in the above-referenced exhibits to the
 11 10/15/12 Wion Declaration, many of which have previously been sealed pursuant to orders of
 12 this Court. To the extent that the Court determines that those exhibits should remain filed
 13 under seal, Microsoft’s Opposition to Defendants’ Motions *in Limine* should be filed publicly
 14 only in redacted form to avoid disclosure of the confidential information contained in those
 15 exhibits. Microsoft is seeking to file under seal only those limited portions of its Opposition to
 16 Defendants’ Motions *in Limine* that contain information that should be protected from public
 17 disclosure under the governing standards outlined above. While a complete and unredacted
 18 version of Microsoft’s Opposition to Defendants’ Motions *in Limine* is being filed under seal,
 19 Microsoft is filing a redacted version as part of the public record.

20 **III. CONCLUSION**

21 Microsoft has filed the above-referenced documents under seal in compliance with the
 22 terms of the Protective Order, the Court’s prior Orders referenced above in Section II.B.1.a and
 23 the applicable Court rules. Nothing herein is intended as a waiver of Microsoft’s right to
 24 contest Motorola’s designation of material as Confidential Business Information in accordance
 25 with the terms of the Protective Order. Microsoft expressly reserves the right to do so as the
 circumstances warrant.

1 A [Proposed] Order Granting Microsoft's 10/15/12 Motion to File Documents Under
2 Seal has been submitted herewith.

3 DATED this 15th day of October, 2012.

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CERTIFICATE OF SERVICE

I, Linda Bledsoe, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.

2. On the 15th day of October, 2012, I caused the preceding document to be served on counsel of record in the following manner:

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8 DATED this 15th day of October, 2012.

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s/ Linda Bledsoe
LINDA BLEDSOE